

January 8, 2004

AOR 2004-1
(20 day)

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OFFICE OF THE
GENERAL COUNSEL
FEDERAL ELECTION
COMMISSION

Federal Election Commission
Office of the General Counsel
999 E Street, N.W.
Washington, D.C. 20463

Re: Advisory Opinion Request

Dear Commissioners:

Pursuant to 2 U.S.C. 437(f), this Advisory Opinion Request seeks clarification about whether the President of the United States, as a federal candidate and officeholder, may convey his endorsement or support of a federal candidate in a public communication without that constituting an in-kind contribution to his re-election campaign. This request also seeks clarification of the extent to which the President or his agents may review such a communication, including the scripts and footage, both outside and within the 120 day window of 11 C.F.R. 109.21.

On behalf of Bush-Cheney '04, Inc. (hereinafter "Bush-Cheney '04") and Alice Forgy Kerr For Congress (hereinafter "Kerr for Congress"), this letter seeks an Advisory Opinion pursuant to 2 U.S.C. 437(f) concerning political advertisements advocating State Senator Kerr's election in a February 17, 2004 special election in Kentucky's 6th Congressional District. The ads, which will be paid for by Kerr for Congress, include images and/or audio of President George W. Bush intended to convey his support of State Senator Kerr's election. The President, is a candidate for re-election and will appear on the May 18, 2004 presidential primary ballot in Kentucky. The ads do not refer to or mention that the President is a candidate for re-election and do not expressly advocate the election or defeat of any presidential candidate.

Because this request is filed within 60 days of the February 17th special election, we request an expedited response from the Commission within the 20 days provided by 2 U.S.C. 437f(a)(2) and 11 C.F.R. 112.4(b).

We file this request to clarify a number of questions that arise under the Bipartisan Campaign Reform Act ("BCRA") and the Federal Election Commission's implementing regulations, as well as the Commission's Advisory Opinion 2003-25 concerning an ad paid for by a state candidate featuring a federal candidate. As the scripts attached as Exhibit A indicate, the congressional campaign ads at issue include the President.

Based on 11 CFR 109.21(c) and (d) and the Commission's previous Advisory Opinions, the ads do not contain any express advocacy of the President's re-election and since he is not identified or referred to as a candidate, there is no payment necessary by Bush-Cheney '04 to Kerr for Congress. If the Commission disagrees, we request guidance on the proper method of allocation in order to avoid either Kerr for Congress or Bush-Cheney '04 making excessive contributions to the other. However, until the Commission opines and before such ads are aired, in order to avoid any suggestion of an illegal contribution or expenditure and out of an abundance of caution, Bush-Cheney '04 has escrowed funds to pay for a portion of these advertisements based on the time/space formula should the Commission determine such an allocation is required. 11 C.F.R. 106.1(a)(1).

FACTS

State Senator Alice Forgy Kerr is the Republican candidate in the February 17th special election in Kentucky's Sixth Congressional District. Alice Forgy Kerr For Congress is her principal campaign committee, as defined in 2 U.S.C. § 431(5).

George W. Bush is the President of the United States and a candidate for re-election in the November 2, 2004 election. His re-election committee is registered with the FEC as Bush-Cheney '04, Inc. His name will appear on the ballot in Kentucky's presidential primary on May 18, 2004. He is supporting State Senator Kerr's election to the U.S. House of Representatives.

In order to convey that "endorsement," Kerr for Congress wishes to air one or several ads prior to the February 17, 2004 special election using the scripts attached as Exhibit A. The proposed ads advocate the election of State Senator Kerr. They do not advocate the election of the President and do not reference his election or the fact that he is a candidate for federal office.

Kerr for Congress wishes to run the ads both before and after the date that is 120 days from Kentucky's presidential primary. The ad will not include any on-screen graphics or other communicative content referring to the President such as a sign in the background. The ads do not solicit contributions for Kerr for Congress or for Bush-Cheney '04. They do not include any campaign materials prepared by Bush-Cheney '04, President Bush or the agents of either. The scripts for the ads were not developed by Bush-Cheney '04, the President or agents of either, nor did the request or suggestion that the President appear in the ads originate with him, Bush-Cheney '04 or their agents.

Agents of the President will review the final script in advance of the President's appearance in the advertisements for legal compliance, factual accuracy, quality, consistency with the President's position and any content that distracts from or distorts the "endorsement" message that the President wishes to convey. While review and airing of the first ad will occur outside the 120 day

window, Kerr for Congress plans to air other ads from among the scripts attached as Exhibit A within the 120 day period. The President's agents wish to have the same review process within the 120 day window.

LEGAL DISCUSSION

In past advisory opinions, the Commission has approved advertisements such as the ones proposed here that make no reference to the "endorsing" candidate's election or candidacy. *See* FECs AO 2003-25, 1982-56, 1980-28. In those opinions, the Commission did not require any allocation of costs and did not find improper coordination occurred. The FEC's initial threshold for any allocation has been "express advocacy" of the "endorser" or, at a minimum, some reference to the "endorser's" candidacy or election. In AO 2003-25, the Commission determined that no allocation had to be made to the federal candidate/"endorser's" campaign since there was no express advocacy of his election. In that case, the Commission even permitted the ad to be paid for with non-federal "soft dollars" by the state candidate who was endorsed, even though the federal candidate "endorser" is a candidate at the next federal election in the state.

In AO 1982-56 (involving a Member of Congress endorsing a state candidate), the Commission confirmed that "although media or other public appearances by candidates may benefit their election campaigns, the person defraying the costs of such an appearance will not be deemed to have made a contribution in-kind to the candidate absent an indication that such payments are made to influence the candidate's election to Federal office." *Id.* at 2, *citing* FEC AOs 1982-15, 1981-37, 1980-30, 1980-28, 1978-4, 1977-42 and 1977-31 (as qualified by Advisory Opinion 1981-37). The Commission emphasized that no in-kind contribution resulted as long as the purpose of the ad was 1) "to advocate the election of the candidate receiving the endorsement rather than that of the Member of Congress and 2) the text of the advertisement emphasizes the election of the candidate being endorsed, and not the reelection campaign of the Congressman." *Id.*

Requesters wish to confirm this guidance in light of BCRA's implementation, especially concerning an endorser's ability to approve the use of his or her image or words, particularly within 120 days of an election. 11 C.F.R. 109.21(c)(4)(ii).

In Advisory Opinion 2003-25, the FEC approved an ad where a federal officeholder and candidate for re-election in 2004 appeared in an ad "endorsing" a mayoral candidate running in 2003. In that Opinion, the FEC concluded that the federal candidate/officeholder's appearance in the ad did not automatically "promote or support" his election and, therefore, the mayoral candidate could use non-federal campaign funds to pay for the ad. The Commission also found that the appearance of the federal candidate/officeholder in the ad did not constitute a

contribution to his campaign even though the Opinion assumed, based on the facts presented, that the federal candidate/officeholder would view the ad and approve the use of his image in the spot prior to the ad being run. It is important to note that this decision was reached under the BCRA restrictions on using any non-federal funds, so-called "soft money", for any "federal election activity."

The FEC concluded in Advisory Opinion 2003-25, "that the payment for "Committed" [the mayoral campaign ad], is not a contribution to Senator Bayh," even after acknowledging that, "Congress has defined one type of in-kind contribution as an expenditure made by any person 'in cooperation, consultation, or in concert, with or at the request or suggestion of a candidate' (2 U.S.C. 441a(a)(7)(B)(i))."

Rather, the FEC acknowledged that under its newly enacted BCRA-mandated regulations on "coordination," for such an ad to be categorized as an in-kind contribution to the endorser referenced in the ad it had to meet the FEC's three-pronged test of a "coordinated communication."

It is the clarification of that test that requestors seek here. Based on the Commission's precedents, it appears that an ad run more than 120 days before an election does not raise an issue of the "endorser's" "coordination" and the possible resulting "in-kind" contribution to the "endorser's" campaign. This presumes the ad in question is paid for by the candidate's campaign receiving the "endorsement" and there is no advocacy of the "endorser" or any reference to the "endorser's" election or candidacy. Bush-Cheney '04 and Kerr for Congress seek confirmation of that interpretation and also that the "endorsing" candidate whose election is not mentioned or advocated, or his agents may still within 120 days of his own appearance on the ballot review such scripts and footage without violating the coordination rules at 11 C.F.R. 109.21.

ADDITIONAL QUESTIONS

- The Committee seeks clarification on whether Kerr for Congress should pay the entire cost of such ads or allocate a portion of the cost to Bush-Cheney '04, and whether and to what extent discussions about the contents of the ads and use of the footage can be conducted with agents of the President under BCRA's coordination rules, 11 C.F.R. 109.21. Specifically:

In an advertisement that airs more than 120 days before the presidential primary in a state:

- May President Bush appear in an ad paid for and requested by a congressional candidate, if the President's candidacy or election are not mentioned, without triggering an in-kind contribution to the President's campaign whether or not reviewed by agents of the President?
- May the ads reference aspects of the President's record, positions, or agenda as shown in the attached scripts, without the ads becoming an in-kind contribution to the President's re-election campaign even if reviewed by agents of the President? What are the limitations on the type of permissible review of such ads? May the ad refer to State Senator Kerr's support for a policy of the President's, as shown in the attached scripts, without the ads becoming an in-kind contribution to the President's re-election campaign even if reviewed by agents of the President? Are there any limitations on the type of permissible review by the President's agents of such ads?
- If any such activity triggers an in-kind contribution, may the President's campaign pay for a portion of the ad in order to avoid an excessive contribution? Would the time-space method be the proper method of allocating costs? If not, what other method should be used?
- If the President's campaign does not have to pay for a portion of the ad, may the ad refer to State Senator Kerr's support for a policy of the President's?
- Based on the Commission's answers to the above, what type of disclaimer should the ad have?

In an advertisement that airs within 120 days of the presidential primary in a state:

- May President Bush appear in an ad paid for and requested by a congressional candidate, if the President's candidacy or election are not mentioned, without triggering an in-kind contribution if reviewed by agents of the President? What constitutes "material involvement" by agents of the President under the Commission's "coordination communication" regulations at 11 CFR 109.21? Is the nature of review determinative (legal review versus review by other agents of the President)? May the ad be reviewed by agents of the President for legal compliance, factual accuracy, quality, consistency with the President's positions and any content that might distract from the endorsement message that the President intends to convey without triggering a "coordinated communication?" Is the image of the President used in the ad itself relevant (pictures or footage not created for any specific purpose versus images created for a particular ad; pictures or footage accompanied by audio of the President)?
- Can the President's agents approve the use of his image before the ads run, so long as no changes are made, without converting the ad into a coordinated communication?
- Can the President's agents edit the script before the ads run without converting the ad into a coordinated communication? If not, may the edit involve only changes to the President's image and not the text of the ad?
- May the ads reference the President's record, positions, or agenda as shown in the attached scripts, without the ads becoming a coordinated communication? May the ad

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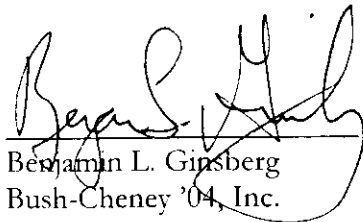
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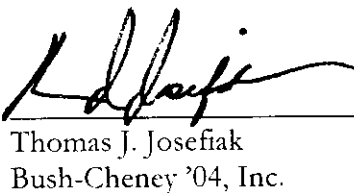
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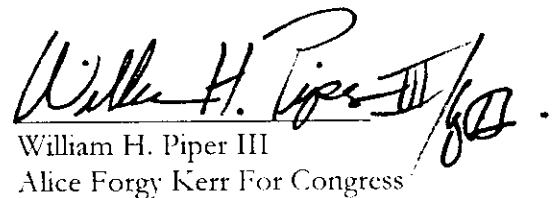
refer to State Senator Kerr's support for a policy of the President's as shown in the attached scripts, without the ads becoming a coordinated communication?

- If such activity does trigger an in-kind contribution, may the President's campaign pay for a portion of the ad in order to avoid an excessive contribution? Would the time-space method be the proper method of allocating costs? If not, what other method should be used?
- If the President's campaign does not have to pay for a portion of the ad, may the ad refer to State Senator Kerr's support for a policy of the President's?
- Based on the Commission's answers to the above, what type of disclaimer should the ad have?

Respectfully submitted,


Benjamin L. Ginsberg
Bush-Cheney '04, Inc.


Thomas J. Josefiak
Bush-Cheney '04, Inc.


William H. Piper III
Alice Forgy Kerr For Congress

cc: The Commissioners

EXHIBIT A

"ENDORSEMENT"

VIDEO	AUDIO
	(Music Up & Under) <u>ANNCR:</u>
Patriotic beauty shots	American values.
Alice talking to people	If you share those values, you're going to like Alice Forgy Kerr.
Alice at desk	She's committed to a strong economy...helping to create good jobs in Kentucky. Alice supports the kind of tax cuts that are now triggering new jobs and economic growth.
	She's hailed the new prescription drug benefit law as a "godsend to Seniors"...
Alice talking to people	and is committed to fight to protect Social Security, Alice Forgy Kerr stands with us.
Bush-Alice walk	The reason President Bush has strongly endorsed her election saying, "in Congress she will work to protect Kentucky values...American values".
Bush-Alice looking off camera shot	
GRAPHIC TREATMENT:	<u>KERR:</u> I'm Alice Forgy Kerr and I approve this message. (Music Under and Out)

<p>Add Endtag Graphics</p> <p>Kerr Talking to Camera Disclaimer APPROVED BY ALICE FORGY KERR & PAID FOR BY ALICE FORGY KERR FOR CONGRESS</p>	
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"SENIORS"

VIDEO	AUDIO
Alice talking to off-camera interviewer SUPER: Alice Forgy Kerr	<u>KERR ("talking" to off-camera interviewer):</u> I was the primary caregiver for my mom before she died.
Still photo of Alice and her mom	I saw firsthand how she was overrun by prescription costs.
Alice with Bush	That's why President Bush's prescription drug law is such a godsend to seniors.
Alice talking to off-camera interviewer	And that's why I'll work to strengthen and protect Social Security.
	No privatization.
	No increase in the retirement age.
Endtag Graphics/Freeze Frame/Disclaimer	<u>ANNCR:</u> Alice Forgy Kerr. Congress is her first choice, not a consolation prize.
Alice talking to camera	<u>KERR (to camera):</u> I'm Alice Forgy Kerr and I approved this message because we owe a good retirement to all of our parents.

"ABSOLUTELY"

VIDEO	AUDIO
Alice on camera SUPER: Alice Forgy Kerr	MUSIC UP & UNDER <u>ALICE:</u> Businesses are overregulated, and they're overtaxed, and they're overburdened. Government doesn't create jobs – businesses do.
Alice walking down hallway SUPER: Alice Forgy Kerr Alice with workers inside warehouse Alice with employees outside warehouse	<u>ANNOUNCER:</u> Alice Forgy Kerr. She's committed to strengthening Kentucky businesses and helping create good jobs.
Bush with Alice Alice with people	In Congress, Alice Forgy Kerr will work with President Bush... to help continue our economic recovery.
Alice on Camera SUPER: Alice Forgy Kerr	<u>ALICE:</u> I absolutely support President Bush's tax cuts.
Alice with workers inside warehouse Kevin McCarthy on camera ID: Kevin McCarty Warehouse Manager	<u>KEVIN MCCARTY:</u> We need to make and keep good jobs here in Kentucky, and I think Alice will fight to make sure that happens.
SUPER: Alice Forgy Kerr For Congress APPROVED BY ALICE FORGY KERR AND PAID FOR BY ALICE FORGY KERR FOR CONGRESS	<u>ALICE:</u> I'm Alice Forgy Kerr and I approve this message.

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"VALUES"

VIDEO	AUDIO
	(Music Up & Under)
	<u>ANNCR:</u>
Patriotic beauty shots	American values.
	If you share the values
Bush waving	of President Bush,
	you're going to like Alice Forgy Kerr.
Bush-Alice walk	They are cut from the same cloth.
GRAPHIC TREATMENT: Bush talking at podium SUPER under: match audio line	While others attack the President's economic program,
Add second SUPER under Bush: Match audio line	and his fight to protect our national security,
	Alice Forgy Kerr stands with President Bush.
Bush-Alice looking off camera shot	Unlike her opponent,
	Alice supported the Bush tax cuts that are now triggering new jobs and economic growth.
Alice talking to people	Alice Forgy Kerr is the <u>only</u> candidate who will work with President Bush.
SUPER: Supported Bush Tax Cuts Add Economic Headlines	
	<u>KERR:</u>
Reprise Bush-Alice shot Add Endtag Graphics	I'm Alice Forgy Kerr and I approve this message.
	(Music Under and Out)
Kerr Talking to Camera Disclaimer APPROVED BY ALICE FORGY KERR & PAID FOR BY ALICE FORGY KERR FOR CONGRESS	